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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THOMAS IGLESIAS,

Plaintiff and Appellant,

v.

WELCH FOODS, INC., A
COOPERATIVE, et al.,

Defendants and Respondents.

A159565

(San Francisco City & County
Super. Ct. No. CGC-16-555566)

Plaintiff Thomas Iglesias sued defendants Welch Foods, Inc. and Promotion in Motion, Inc.¹ regarding certain labeling on Welch’s Fruit Snacks (fruit snacks). Following the first phase of a bifurcated trial, the trial court concluded defendants properly listed “fruit puree,” followed by a parenthetical of the constituent sub-ingredients, in accordance with Food and Drug Administration (FDA) regulations. The court subsequently entered a judgment against Iglesias.

On appeal, Iglesias contends the trial court erred by not deferring to an FDA Compliance Policy Guide and thus improperly interpreted the relevant

¹ Defendants answered as “Welch Foods, Inc., a Cooperative and The Promotion in Motion Companies, Inc. (Erroneously sued as Welch Foods, Inc. and Promotion in Motion, Inc.” We will refer to defendants in this opinion as Welch Foods, Inc. and PIM, respectively.

FDA regulations. Iglesias further asserts the trial court considered improper hearsay evidence. While we agree the trial court incorporated one statement containing hearsay into its decision, we find the error harmless and affirm the judgment.

I. BACKGROUND

PIM manufactures and distributes the fruit snacks at issue. PIM licenses the name “Welch’s” from defendant Welch Foods, Inc. The packaging for the fruit snacks states, “Fruit is our 1st Ingredient!” at the top of the front label. The “Nutrition Fact Panel” then lists “FRUIT PUREE” as the first ingredient, followed by corn syrup.

The fruit puree is provided by a third party supplier. PIM requests a “flavor profile” from the supplier, who then produces a fruit puree to match PIM’s request. The supplier certifies to PIM that the fruit puree only contains fruits and discloses the types of fruits by weight in descending order, but does not disclose the actual formula of the puree.

Iglesias regularly purchased the fruit snacks. He made such purchases based in part on the label’s “Fruit is our 1st Ingredient” representation. Iglesias asserts if PIM listed each individual fruit rather than grouping them together as “fruit puree,” then “corn syrup, sugar, or modified corn starch is actually the ingredient that should be listed first on the ingredients list.” Iglesias asserts he would not have purchased the fruit snacks had he known fruit was not the first ingredient.

Iglesias subsequently filed a complaint² against defendants Welch Foods, Inc. and PIM, alleging violations of the California Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.) and California’s unfair competition

² Iglesias initially filed the complaint as a class action, but then filed an amended complaint without the class allegations.

law (Bus. & Prof. Code, § 17200 et seq.). The complaint asserts the statement “Fruit is our 1st Ingredient” is false and misleading because if each fruit puree (e.g., grape, peach, orange, strawberry, and raspberry) were listed separately, sugar would be the first ingredient. The complaint further alleges defendants’ grouping of several different fruits as “fruit puree” violates FDA regulations requiring foods to list ingredients by “ ‘common or usual name’ ” in “descending order of predominance by weight” and by each ingredient’s “ ‘specific name and not a collective (generic) name.’ ”

During the parties’ litigation, Iglesias sought discovery regarding the supplier of the fruit puree and the weight percentages of the various ingredients in the fruit snacks. The trial court subsequently ordered defendants to provide the name of the supplier of the fruit puree ingredient and the weight of the various ingredients in the fruit snacks, including the various purees that constitute the fruit puree (discovery order). The court also ordered defendants to provide responsive documents sufficient to show the proportions of each ingredient’s weight in the fruit snacks to the extent known by defendants. The trial court found “the respective weights of the various ingredients that comprise the [fruit snacks] ‘Fruit Purees’ are information relevant to determine whether fruit is the predominant ingredient in the [fruit snacks], as advertised by Defendants.”

The parties agreed to stay the discovery order and bifurcate the case into two separate phases. The first phase would address “whether Defendants are permitted to identify ‘fruit puree’ as an ingredient in [the fruit snacks] followed by a parenthetical listing of each constituent fruit” under the applicable regulations and the FDA Compliance Policy Guide (fruit puree labeling issue). The second phase would resolve whether the statements “Fruit is our 1st Ingredient” and “No Preservatives” are false and

misleading. The parties agreed to conduct a bench trial on the papers for the first phase.

The parties submitted trial briefs regarding the fruit puree labeling issue. PIM argued use of “fruit puree” as an ingredient is consistent with FDA regulations, and industry usage established “fruit puree” as a common or usual name pursuant to those regulations. PIM further argued Iglesias’s claims were both expressly preempted and impliedly preempted, and the claims are barred by the safe harbor doctrine. In support of its brief, PIM submitted declarations from Basant Dwivedi, Ph.D., Sheldon T. Bradshaw, and Lynn Dornblaser.

Dwivedi serves as PIM’s chief operating officer. In his declaration, Dwivedi stated he created the formula for the fruit snacks, and he instructs the fruit puree supplier as to what flavor profile PIM requires. The supplier then provides a fruit puree to match that flavor profile. The fruit puree provided to PIM “is a smooth, creamy substance.” Dwivedi further stated the fruit puree supplier has repeatedly refused to disclose its formula, i.e., “the percentage of each of the constituent fruits that comprise the fruit puree.” Rather, the supplier only provides a list of the constituent fruits by weight in descending order. Dwivedi stated no one at PIM knows the percentage of each constituent fruit in any puree. However, the supplier “has certified . . . that the fruit puree supplied to PIM contains only fruit, and no other added ingredients.” Dwivedi noted if PIM could not list “fruit puree” as an ingredient, it would be required to develop its own substitute or try to find another supplier who would provide its formula.

Bradshaw served as chief counsel of the FDA for a two-year period. He offered an expert declaration asserting the statement of ingredients appropriately lists the proprietary blend of fruits as a single ingredient (fruit

puree) followed by a parenthetical identifying the specific sub-ingredients in the puree. He also asserted the ingredient name “fruit puree” has support in both FDA regulatory history and in industry usage, and thus constitutes a common and usual name. He noted the third party supplier independently labels the product it provides to PIM as “fruit puree,” the phrase accurately describes the product, and “over 100 other products sold by more than 35 companies in a wide variety of food products describe a blend of fruits as ‘Fruit Puree’ in their Statement of Ingredients.” Bradshaw explained the FDA has recognized the “‘common name’” of other ingredients based on similar amount of usage. Likewise, Bradshaw noted the FDA has never taken issue with a manufacturer using the ingredient label “‘Fruit Puree.’”³

Dornblaser is employed with Mintel Group, Ltd. (Mintel), which specializes in market research for product labeling on consumer packaged goods. Mintel, at Bradshaw’s request, conducted research to identify companies and products that identify “‘fruit puree(s)’” or “‘puree(s)’” as an ingredient. She attached to her declaration a PowerPoint presentation prepared by Mintel identifying the companies and products using those terms (Mintel report).

Iglesias also filed a trial brief regarding the fruit puree labeling issue. Contrary to defendants’ position, Iglesias argued “fruit puree” is not a common or usual name, the FDA’s Compliance Policy Guide prohibits use of the term, and the FDA declined to find other ingredient names, such as “evaporated cane juice,” to be “common or usual name[s]” despite being used

³ Prior to the bench trial on the fruit puree labeling issue, Iglesias moved to exclude Bradshaw’s declaration on the basis he was not qualified to provide expert testimony on food and drug law. The court granted the motion to the extent his declaration contained conclusions of law, hearsay, or other “improper statements,” but denied it “as to all other respects.”

by hundreds of manufacturers. He further noted the Mintel report demonstrates “fruit puree” has been used to describe various fruit combinations, has been used generically without any sub-ingredients listed, and included combinations that have no fruit or other nonfruit ingredients. Because there is no common or usual name, Iglesias asserts, the manner in which “fruit puree” has been listed is inappropriate. Next, Iglesias contended his claims were not preempted because states are entitled to adopt requirements pertaining to labeling that are identical to those contained in the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.; FDCA). Finally, he objected in part to various statements in Dwivedi’s declaration on the basis of hearsay.

Following a bench trial, the trial court issued its statement of decision. The court concluded Iglesias’s claims were not preempted, and defendants can identify “fruit puree” as an ingredient in the fruit snacks followed by a parenthetical listing of each constituent fruit. Regarding preemption, the trial court explained the claims were not expressly preempted because Iglesias was only seeking to impose state law requirements that were identical to federal law. Likewise, the court found the claims were not impliedly preempted because while the FDCA provides no private right of action to enforce federal law, it does not impact private claims predicated on state law.⁴

⁴ On appeal, defendants reassert that Iglesias’s claims are preempted. However, defendants did not file a cross-appeal and have not shown that review of this issue is necessary to determine whether any error was prejudicial as to Iglesias, so as to bring themselves within the statutory exception to the requirement that a respondent must file its own notice of appeal in order to obtain affirmative relief by way of appeal. (Code Civ. Proc., § 906; see Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The

As to the fruit labeling issue, the trial court emphasized whether defendants may list fruit puree followed by a parenthetical listing of each constituent fruit depends on whether “fruit puree” is an established common or usual name. The court found “fruit puree” constitutes a common or usual name because the term is established by common usage in the industry, the phrase is consistent with the standard dictionary definition for “puree,” and the parenthetical allows consumers to distinguish one type of “fruit puree” from another. The trial court rejected Iglesias’s reliance on section 505.100 of the FDA’s Compliance Policy Guide⁵ as not binding on the FDA or the public. The court further noted section 505.100 had little relevance because it addressed labeling of “catch-all” or “shotgun” items—i.e., assortments or multiple items containing non-uniform ingredients—as opposed to labeling of a single ingredient that contained multiple sub-ingredients. Accordingly, the trial court concluded existing law allowed defendants to list “fruit puree” followed by a parenthetical listing of each constituent fruit as an ingredient in the fruit snacks.

Iglesias filed an application to voluntarily dismiss his entire case with prejudice, and the court subsequently entered judgment against Iglesias. Iglesias timely appealed.

Rutter Group 2019) ¶ 8:195.) Thus, we are not required to decide defendants’ assertions of error in this respect, and we decline to do so.

⁵ Section 505.100 of the FDA’s Compliance Policy Guide states in part, “Names that are not accepted common or usual names such as fruit purees, fruits, edible oils, gums, emulsifiers, nut meats, etc., should not be used. Such ingredients should be listed each by specific common or usual names.”

II. DISCUSSION

A. *Standard of Review*

The parties disagree as to the proper standard of review in this matter. Iglesias contends the trial court's holding that "fruit puree" is a common and usual name should be reviewed de novo. Defendants contend the trial court's decision was based on conflicting evidence presented by the parties regarding the "fruit puree" label, and therefore subject to substantial evidence review.

To the extent the trial court's ruling interpreted and applied statutes, which are questions of law, we review the ruling de novo. (*Nortel Networks Inc. v. Board of Equalization* (2011) 191 Cal.App.4th 1259, 1268.) Iglesias's appeal, however, primarily challenges factual findings of the trial court; we will not disturb these findings if substantial evidence supports the judgment. (*Ibid.*; *People v. Simms* (2018) 23 Cal.App.5th 987, 994 [“ ‘ “[w] here the trial court applies disputed facts to such a statute, we review the factual findings for substantial evidence and the application of those facts to the statute de novo” ’ ”].)

“ ‘Under the substantial evidence standard of review, “we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting

inferences in the absence of a rule of law specifying the inference to be drawn.” ’ ” (*Schwan v. Permann* (2018) 28 Cal.App.5th 678, 693–694.)

Iglesias argues the material facts in this matter are undisputed, and thus the trial court’s ruling should be reviewed as a question of law. We disagree. The parties disagreed as to the consistency with which the “fruit puree” label was used in the industry. Their dispute over the proper interpretation of the Mintel report demonstrates more than one inference may be drawn as to whether the evidence demonstrated common usage of the “fruit puree” label. And the trial court, based on its review of the evidence, resolved this evidentiary dispute and concluded “fruit puree” was a common and usual name under applicable regulations. Accordingly, substantial evidence review applies.

B. Relevant Regulatory Framework

“The FDCA prohibits the misbranding of any food. ([21 U.S.C.] § 331(b).) A food ‘shall be deemed to be misbranded’ under the FDCA if ‘its labeling is false or misleading in any particular’ ([*Id.*] § 343(a).)” (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1085.) “Ingredients required to be declared on the label or labeling of a food . . . shall be listed by common or usual name in descending order of predominance by weight” (21 C.F.R. § 101.4(a)(1) (2020).) While generally “[t]he name of an ingredient shall be a specific name and not a collective (generic) name,” the Code of Federal Regulations provides various exceptions to this rule. (*Id.*, § 101.4(b) (2020).) As relevant here, one exception provides: “An ingredient which itself contains two or more ingredients and which has an established common or usual name . . . shall be designated in the statement of ingredients on the label of such food by either of the following alternatives: [¶] (i) By declaring the established common or usual name of the ingredient followed by a

parenthetical listing of all ingredients contained therein in descending order of predominance [¶] (ii) By incorporating into the statement of ingredients in descending order of predominance in the finished food, the common or usual name of every component of the ingredient without listing the ingredient itself.” (*Id.*, § 101.4(b)(2) (2020).)

“The common or usual name of a food . . . shall accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients. The name shall be uniform among all identical or similar products and may not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name.” (21 C.F.R. § 102.5(a) (2020).) “A common or usual name of a food may be established by common usage or by establishment of a regulation in Subpart B of this Part, in part 104 of this chapter, in a standard of identity, or in other regulations in this chapter.” (*Id.*, § 102.5(d) (2020).)

C. Ingredient Statement Listing Fruit Puree

Iglesias contends “fruit puree” is a generic name and asserts the trial court erred in failing to defer to the FDA’s Compliance Policy Guide. Iglesias argues the mere use of “fruit puree” by other manufacturers cannot support the trial court’s holding because different products use the phrase to represent different types of purees.

1. Deference to FDA’s Compliance Policy Guide

Historically, the FDA’s interpretation of its regulations have been “‘controlling unless plainly erroneous or inconsistent with the regulation[s]’ or there is any other reason to doubt that they reflect the FDA’s fair and considered judgment.” (*PLIVA, Inc. v. Mensing* (2011) 564 U.S. 604, 613, citing *Auer v. Robbins* (1997) 519 U.S. 452, 461 (*Auer*).) Such deference has

generally been referred to as *Auer* deference or, occasionally, *Seminole Rock*⁶ deference. (*Kisor v. Wilkie* (2019) ___ U.S. ___ [139 S.Ct. 2400, 2408] (*Kisor*).) In 2019, the United States Supreme Court expounded upon the limits of *Auer* deference. (*Kisor*, at pp. 2415–2418.) In *Kisor*, the Supreme Court explained courts may only defer to an agency’s reasonable interpretation of its own genuinely ambiguous regulations after exhausting all “ ‘traditional tools’ of construction,” so long as the “character and context of the agency interpretation entitles it to controlling weight.” (*Id.* at pp. 2414–2416.) Here, Iglesias does not contend the relevant statute framework is ambiguous. To the contrary, he asserts “[t]he mandate of Sections 101.4(a)(1)–(b) [of 21 Code of Federal Regulations] is clear.” His argument is entirely focused on whether “fruit puree” satisfies the labeling requirement that food be identified by a common or usual name. He asserts “fruit puree” has no “defined statement of identity,” is generic, and is not an acceptable collective name. He further contends different manufacturers do not use “fruit puree” uniformly, and thus industry practice does not support a finding that “fruit puree” is a usual or common name. Iglesias’s argument is based entirely on the parties’ evidentiary showing (e.g., “the only evidence in the case proves that fruit purees, while used frequently, are not used in a common or usual way”), not statutory interpretation. Because Iglesias does not contend the regulations at issue are ambiguous,⁷ deference is inappropriate. (*Kisor*, *supra*, 139 S.Ct. at pp. 2415–2416.)

⁶ *Bowles v. Seminole Rock Co.* (1945) 325 U.S. 410.

⁷ In his reply brief, Iglesias asserts deference to the FDA’s Compliance Policy Guide is “allowable because all of the requirements in *Kisor* are met *should* the Court find an ambiguity after considering the text, history and purpose of [21 Code of Federal Regulations] Sections 101.4(b) and 102.5(a).” (*Italics added.*) But he still does not argue such an ambiguity exists. “An appellant must provide an argument and legal authority to support his

Moreover, deference is only appropriate where the agency's determination constitutes its " 'authoritative,' " expertise-based, and " 'fair and considered judgment.' " (*Kisor, supra*, ___ U.S. at p. ___ [139 S.Ct. at pp. 2416–2417].) Undoubtedly, the FDA's Compliance Policy Guide represents an authoritative guide based on the FDA's expertise. However, section 505.100 of the guide—the provision upon which Iglesias relies—addresses a " 'catch-all' " or " 'shotgun' " ingredients declaration.⁸ The "background" to this section notes the FDA "has consistently objected to 'catch-all' or 'shotgun' ingredient statements" while recognizing "there may be instances where this may be a practical technique for labeling assortments or multiple items containing nonuniform ingredients." In this context, section 505.100 sets forth a policy on how manufacturers could create appropriate "catch-all" or "shotgun" ingredient statements. Section 505.100 then explains circumstances in which "[i]t is not possible to devise shotgun labeling"—namely, "where a manufacturer wishes to be able to use one or more ingredients interchangeably." The policy goes on to note adequate labeling may be possible if the interchangeable items can all be designated by a common name (such as leavening or baking powder), but "[n]ames that are not accepted common or usual names such as fruit purees, fruits, edible oils, gums, emulsifiers, nut meats, etc., should not be used. Such ingredients should be listed each by specific common or usual names." Accordingly, when labeling, for example, a variety pack of cookies that each contain different

contentions. . . . It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

⁸ This provision was revised in November 2005.

fruit purees, the ingredient statement could not simply list “fruit purees” to encompass all the different types of fruit purees in the different cookies. Here, however, we have a single fruit puree that is comprised of various sub-ingredients. We cannot interpret the FDA’s policy on the former situation to constitute its “ ‘fair and considered judgment’ ” on the later situation. (See, e.g., *Zhejiang Machinery Import & Export Corp. v. U.S.* (Ct.Internat.Trade Aug. 21, 2020, No. 19-00039) 2020 WL 4917573, at pp. *7–*8 [ad hoc statement “does not ‘reflect “fair and considered judgement” ’ of the definitions of factual information”]; accord *Kisor*, *supra*, ___ U.S. at p. ___ [139 S.Ct. at pp. 2417–2418] [“a court should decline to defer to a merely ‘convenient litigating position’ or ‘*post hoc* rationalizatio[n] advanced’ to ‘defend past agency action against attack.’ [Citations.] [Fn. omitted.] And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates ‘unfair surprise’ to regulated parties.”].) Accordingly, the trial court did not err in declining to defer to the FDA’s Compliance Policy Guide.

2. Whether “Fruit Puree” Constitutes a “Common or Usual Name”

Iglesias first contends “fruit puree” cannot meet the regulatory requirement for labeling by a “common or usual name” because the phrase “fruit puree” is not specific and is a collective name. (See 21 C.F.R. § 101.4(b) (2020) [the “common or usual name” must be “a specific name and not a collective (generic) name”].)

However, this argument ignores the exceptions set forth in 21 Code of Federal Regulations part 101.4(b) (2020). As relevant here, part 101.4(b)(2) provides an exemption to the specific name requirement for an ingredient with two or more sub-ingredients “and which has an established common or usual name.” (21 C.F.R. § 101.4(b)(2)(i) (2020).) Those ingredients may

instead be listed by “the established common or usual name of the ingredient followed by a parenthetical listing of all ingredients contained therein.”

(Ibid.)

The question thus is whether “fruit puree” is an “established common or usual name” such that it falls within the exception to the requirement that ingredient names be specific and not collective.

Part 102.5 of 21 Code of Federal Regulations (2020) provides guidance on what may constitute the “common or usual name” of a food. That provision explains the common or usual name must (1) “accurately identify or describe . . . the basic nature of the food”; (2) “be uniform among all identical or similar products”; and (3) “not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name.” (21 C.F.R. § 102.5(a) (2020).) Part 102.5 further notes, “A common or usual name of a food may be established by common usage” (*Id.*, § 102.5(d) (2020).)

As noted by the trial court, various companies and products use the phrase “fruit puree,” followed by a parenthetical listing of the sub-ingredients contained therein. Similar fruit snack products using this labeling approach include various flavors of “Fruit Snacks” by Florida’s Natural, “Fruit Sour Strings” by Florida’s Natural, “Fruit Juice Nuggets” by Florida’s Natural, “Fruit Juice String” by Florida’s Natural, “Gummy Fruit Flavored Snacks” by Gold Emblem, “Medley Gummy Candies” by Dare Realfruit Gummies, “Fruit Juicy Red Candy Twists” by Hawaiian Punch, “Fruit Snacks” by Eillien’s Flavor Burst!, “Berries & Greek Yogurt Real Fruit Gummies” by Brach’s, “Gocce di Sole Candies” by Lindt European Specialties, and “Fruit Snacks” by Market Pantry. Those products contain similar “fruit puree” ingredient listings, including: “Fruit juice and puree from concentrate (pear puree from

concentrate, pear juice from concentrate, orange juice from concentrate)”; “Fruit Juice and Puree From Concentrate (pear puree from concentrate, pear juice from concentrate, strawberry juice from concentrate, blueberry juice from concentrate)”; “fruit purees (grape puree, apple puree, strawberry puree)”; “fruit purees (pear puree, strawberry puree, cherry puree)”; “fruit purees (apricot, papaya, guava)”; “fruit purée (apple, lime, and orange)”; “fruit purees (blackcurrant puree, strawberry puree)”; “fruit purees (lime, orange, strawberry, raspberry, apple, lemon, pineapple)”; and “fruit puree (grape, apple, strawberry, raspberry).” Other products listing “fruit puree” in their ingredient statements include sorbets and ice pops, snack bars, snack blends, various pastries, chocolates, yogurt, squeezable fruit/vegetable purees and drinks, and mandarin orange sauce. All of these products, with the exception of the mandarin orange sauce,⁹ involve a puree of at least one type of fruit and other ingredients (such as other fruits, water, sugars, other flavorings, and/or setting/thickening agents). Despite Iglesias’s arguments to the contrary, these products demonstrate a similarity in how the phrase “fruit puree” is used in ingredient labeling.

The parties present conflicting evidence regarding whether this level of usage is sufficient to constitute “common usage.” Defendants note the FDA recognized muscovado sugar based on its use in 106 products, and recognized demerara sugar based on its use in 145 products. In contrast, Iglesias notes “hundreds of companies previously used the name ‘evaporated cane juice,’ ” but the FDA rejected that label as a common or usual name because it would result in consumer confusion.

⁹ The mandarin orange sauce appears to be the only product that does not list a whole fruit/fruit puree in its fruit puree, but it does include “chopped orange peels” and two types of fruit juices.

Likewise, the parties presented conflicting evidence regarding the FDA's approach to labeling in analogous ingredients. For example, the FDA adopted regulations approving similar labeling for mixed fruit preserves or jams. Defendants also offered evidence of warning letters sent by the FDA to various companies regarding labeling issues, none of which flagged their use of "fruit puree" as problematic. In response, Iglesias noted the FDA has declined to recognize " 'Fruit juice concentrates' " as an established common or usual name.¹⁰ While there is certainly evidence supporting both parties, our job is not to reweigh the evidence but instead to assess whether substantial evidence supports the judgment. (*Schwan v. Permann, supra*, 28 Cal.App.5th at p. 693 [“ ‘ “It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.” ’ ”].) The evidence demonstrates the FDA has approved as a "common or usual name" both similar products and ingredients with a similar level of industry usage.

In addition, defendants presented evidence that the "fruit puree" used in the fruit snacks accurately describes the "basic nature of the food" because it meets the dictionary definition for "puree." (See 21 C.F.R. § 102.5(a) (2020).) "Puree" is defined as "any smooth cream of liquidized food, esp. of fruit or vegetables." (Oxford English Dict. <<https://www.oed.com/view/Entry/>

¹⁰ To the extent Iglesias argues certain regulations incorporate purees within the definition of juice, we note those regulations are distinguishable because they address food safety processing and not labeling. (See, e.g., 21 C.F.R. §§ 120.1(a), 101.17(g)(1) (2020).) Iglesias has not cited any authority indicating the manner in which the FDA regulates food safety is relevant to labeling of ingredient statements.

154850?rskey=7PfUog&result=1#eid> [as of Oct. 27, 2020]; see also Merriam-Webster < <https://www.merriam-webster.com/dictionary/puree> > [as of Oct. 27, 2020] [defined as “a paste or thick liquid suspension usually made from cooked food ground finely”].) And Dwivedi, who formulated the fruit snacks and was the primary contact with the supplier of the fruit puree, submitted a declaration that the product received from the supplier was “a smooth, creamy substance.” His declaration further stated he would request a specific flavor profile from the supplier, and the supplier would provide PIM with a list of the constituent fruits and certify no other ingredients were included in the puree.¹¹ Accordingly, the phrase “fruit puree” appears to “accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food.”¹² (See 21 C.F.R. § 102.5(a) (2020).)

Based on the evidence before the trial court, such as the industry usage and the composition of the fruit puree at issue compared with the standard definition of puree, we conclude the trial court’s ruling was supported by substantial evidence.

D. Trial Court’s Reliance on the Dwivedi Declaration

In concluding that “‘fruit puree’ is a uniform, accurate and simple description of the basic characteristic of the ingredient,” the trial court noted, “According to [Dwivedi], the fruit puree contained in the Products is a smooth, creamy substance made up of the particular constituent fruits

¹¹ We address Iglesias’s hearsay challenge to certain statements in Dwivedi’s declaration in part II.D., *post*.

¹² Iglesias also argues the phrase “fruit puree” is confusing because it confuses consumers into believing fruit is the first ingredient. But the confusion at issue is whether consumers would understand the meaning of “fruit puree.” Iglesias cites no evidence that a consumer would believe the phrase “fruit puree,” followed by a parenthetical listing the constituent ingredients, would confuse any consumer.

requested by Defendants.” The trial court does not reference the Dwivedi declaration in any other portion of its decision.

Iglesias contends the trial court erred by considering hearsay—i.e., statements by Dwivedi regarding the composition of the fruit puree. He asserts PIM does not manufacture the fruit puree and Dwivedi thus has no personal knowledge as to the ingredients contained within the fruit puree.

“ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Dwivedi’s statements regarding the composition of the fruit puree falls within this definition. His only knowledge of what ingredients are contained within the fruit puree are based on information provided to him by the supplier. Defendants argue Dwivedi also possesses knowledge of the fruit puree’s composition due to his status as a corporate representative. But his status as a corporate representative does not afford him special knowledge. PIM’s knowledge also is solely based on the information provided by the supplier to Dwivedi. While Dwivedi has personal knowledge regarding (1) the flavor profile he requested from the supplier, (2) the appearance of the fruit puree provided by the supplier, and (3) the information conveyed by the supplier regarding the fruit puree’s composition, he does not have personal knowledge regarding the truth of the information conveyed by the supplier or the actual composition of the fruit puree.

However, we find the trial court’s error harmless. Under the “traditional harmless error analysis for nonconstitutional error, . . . prejudice is not presumed.” (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1397.) Rather, plaintiffs must show a miscarriage of justice, which should be declared only when the court determines it is reasonably probable a result

more favorable to the appealing party would have been reached absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Here, the actual composition of the fruit puree is irrelevant. Iglesias has not alleged the parenthetical listing of ingredients is erroneous; merely that if those separate fruits were listed separately, then sugar (or a sugar equivalent) would be the first ingredient on the statement of ingredients. The question before the trial court was whether FDA regulations prohibited defendants from using the phrase “fruit puree,” followed by a parenthetical listing the constituent sub-ingredients, when labeling the fruit snacks. Accordingly, the actual composition of the fruit puree is not relevant to the trial court’s order and its reference to the composition was harmless.

III. DISPOSITION

The judgment is affirmed. Defendants Welch Foods, Inc. and Promotion in Motion, Inc. may recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

MARGULIES, J.

WE CONCUR:

HUMES, P. J.

SANCHEZ, J.

A159565

Iglesias v. Welch Foods, Inc., a Cooperative